

BRB No. 03-0674 BLA

HOMER BLACKBURN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SOW BRANCH COAL COMPANY)	DATE ISSUED: 06/08/2004
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Gregory Herrell (Arrington Schelin & Herrell, P.C.) Bristol, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP) Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

Claimant¹ appeals the Decision and Order on Second Remand - Denying Benefits (99-BLA-0635) of Administrative Law Judge Thomas F. Phalen, Jr., (the administrative law judge) on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The case is before the Board for the fifth time. In his most recent decision on remand, the administrative law judge found that the evidence as a whole was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).² Accordingly, the administrative law judge denied the claim.

The relevant procedural history of this case is as follows. Claimant filed a claim with the Social Security Administration (SSA) on January 11, 1973, which was denied by the SSA Appeals Council on June 30, 1977. Director's Exhibit 101. Claimant then filed an election card with DOL on April 7, 1978, requesting that the Department of Labor (DOL) review the claim. *Id.* This claim was denied by a claims examiner on August 17, 1979, and claimant took no further action on this claim. *Id.* Claimant filed a duplicate claim on June 6, 1983. Director's Exhibit 1. Following a hearing, Administrative Law Judge Giles J. McCarthy issued a Decision and Order dated March 27, 1991. Therein, the administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4)(2000) and failed to establish total respiratory disability at Section 718.204(c)(1)-(4)(2000). Accordingly, the administrative law judge found that the newly submitted evidence failed to establish a material change in conditions pursuant to Section 725.309(d)(2000), and he denied the claim. Following claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *Blackburn v. Sow Branch Coal Co.*, BRB No. 91-1054 BLA (Jan. 29, 1993)(unpub.); Director's Exhibit 72. Claimant filed with the Board a request for reconsideration, along with new evidence, which the Board construed as a request for modification. The Board remanded the case, therefore, to the district director. Director's Exhibits 72, 75.

Following the district director's denial of modification, the case was assigned to Administrative Law Judge Stuart A. Levin. Judge Levin issued a Decision and Order dated September 12, 1996, wherein he found that the newly submitted evidence failed to

¹ Claimant is Homer Blackburn, who filed two applications for benefits. The first claim was filed with the Social Security Administration on January 11, 1973. Director's Exhibit 110. Claimant then filed the instant claim on June 6, 1983. Director's Exhibit 1.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

establish the existence of pneumoconiosis at Section 718.202(a)(2000) and total respiratory disability at Section 718.204(c)(2000). Thus, Judge Levin found the evidence insufficient to establish a change in conditions pursuant to Section 725.310(2000). Director's Exhibit 95.³ Accordingly, Judge Levin denied the claim. Following claimant's appeal, the Board affirmed Judge Levin's denial of modification. *Blackburn v. Sow Branch Coal Co.*, BRB No. 97-0135 BLA (Sept. 25, 1997)(unpub.). Director's Exhibit 100.

Claimant then filed a second request for modification with DOL on September 22, 1998. Director's Exhibit 101. The case was assigned to Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge). Judge Phalen found that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2)(2000) and thereby, sufficient to establish a change in conditions pursuant to Section 725.310(2000), and therefore, sufficient to establish a material change in conditions pursuant to Section 725.309(d)(2000). He denied the claim, however, on the basis that the evidence as a whole was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1)-(4)(2000). Following claimant's appeal, the Board affirmed the administrative law judge's findings at Section 718.204(c)(2) and (c)(3)(2000), but vacated his findings at Section 718.204(c)(1) and (c)(4)(2000), and remanded the case to the administrative law judge for reconsideration of the evidence. *Blackburn v. Sow Branch Coal Co.*, BRB No. 00-0530 BLA (Mar. 28, 2001)(unpub.).

On remand, Judge Phalen issued a Decision and Order dated September 27, 2001, wherein he again found that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to both Section 718.204(c)(1) and (c)(4)(2000). The administrative law judge, therefore, denied benefits. Following claimant's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that employer is the putative responsible operator, that the two pulmonary function studies dated January 19, 1999 and April 19, 1999 are invalid pursuant to Section 718.204(c)(1)(2000) and his finding that the evidence fails to establish total respiratory disability pursuant to Section 718.204(c)(4)(2000). The Board reversed, however, the administrative law judge's finding at Section 718.204(c)(1)(2000), and held that the pulmonary function study dated September 18, 1998 by Dr. Sahyouni establishes total respiratory disability thereunder. The Board then remanded the case for the administrative law judge to "weigh the evidence supportive of a finding of totally [sic] respiratory disability against all of the contrary probative evidence of record, in

³ Judge Levin noted that claimant had not alleged a mistake in a determination of fact, except in those matters affirmed by the Board. Consequently, Judge Levin found that the evidence did not support modification, and accordingly denied benefits. Decision and Order dated September 12, 1996 at 3.

order to determine if claimant has established the existence of a totally disabling respiratory impairment at Section 718.204(b)(2) on the merits.” *Blackburn v. Sow Branch Coal Co.*, BRB No. 02-0208 BLA (Jul. 17, 2002)(unpub.). The Board concluded that if the administrative law judge determined that the evidence establishes the existence of a totally disabling respiratory impairment, then he must weigh all of the evidence, to determine if the evidence is sufficient to establish that claimant’s totally disabling respiratory impairment is due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id.*

On remand, Judge Phalen issued a Decision and Order dated June 5, 2003, wherein he found that the sole, valid pulmonary function study, when weighed against the non-qualifying blood gas study and narrative medical opinion evidence, was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). The administrative law judge, therefore, denied benefits. Claimant then filed the instant appeal with the Board.

On appeal, claimant asserts that the administrative law judge failed to follow the Board’s remand instructions and asks that the case be remanded to another administrative law judge for further consideration. Employer responds, urging affirmance. The Director, Office of Workers’ Compensation Programs, has filed a letter indicating that he will not respond to the instant appeal.

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant initially challenges the administrative law judge’s weighing of the medical evidence pursuant to Section 718.204(b)(2) on the merits. Claimant specifically asserts that the administrative law judge did not follow the Board’s instructions in that “all he has done in this claim is to look at the pulmonary function study without regard to any other evidence of record”, and that “no attempt is made to discuss, much less mention, the other evidence of record including the report of Dr. Robinette which is supportive of a totally disabling pulmonary impairment.” Claimant’s Brief at 1. Claimant further asserts that while, in a prior decision, the administrative law judge

discredited Dr. Robinette's opinion because he relied in part on a pulmonary function study that was invalid, because there remains one valid qualifying pulmonary function study in the record, the basis for Dr. Robinette's opinion remains sound and his opinion should have been reconsidered in the final weighing of the evidence at Section 718.204(b)(2). Claimant's Brief at 2.

Contrary to claimant's arguments, the administrative law judge properly weighed the "evidence supportive of a finding of total respiratory disability" against all of the "contrary probative evidence of record," as instructed by the Board. While there are several medical opinions, including that of Dr. Robinette, which conclude that claimant is disabled, as these opinions were all discredited in the administrative law judge's prior decisions, and as his determinations at 718.204(c)(4)(2000) were previously affirmed by the Board as unchallenged on appeal, these other medical opinions are not probative, and, therefore, cannot be said to be "supportive" of a finding of total respiratory disability.⁴ In particular, Dr. Robinette's medical opinion was properly discredited by the administrative law judge in his decision dated September 27, 2001, because it was based in part on the invalid April 19, 1999 pulmonary function study, and both the invalidity of the April 19, 1999 pulmonary function study and the administrative law judge's 718.204(c)(4)(2000) findings were affirmed as unchallenged in the Board's prior decision dated July 17, 2002. *Blackburn v. Sow Branch Coal Co.*, BRB No. 00-0208 BLA (Jul. 17, 2002)(unpub.). While there remains one valid qualifying pulmonary function study in the record, Dr. Robinette did not rely on this study or reference it in his report. Claimant's Exhibit 1. Therefore, contrary to claimant's arguments, the presence of this study in the record does not rehabilitate Dr. Robinette's report, which was previously properly discredited because it was based in part on an invalid pulmonary function study.

Because the administrative law judge properly weighed the "evidence supportive of a finding of total respiratory disability" against all of the "contrary probative evidence of record," as instructed by the Board, and found, as was within his discretion, that the single qualifying pulmonary function study could not establish the existence of a totally disabling respiratory impairment when weighed together with the contrary probative evidence of record, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b). *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999)(the Board will not substitute its inferences for those of the administrative law judge).

⁴ In addition to Dr. Robinette, Drs. Odom, Baxter and Kirby opined that claimant has total respiratory disability. Drs. Odom and Baxter were found unreasoned, and Dr. Kirby's opinion was found to be equivocal. Decision and Order dated January 28, 2000, incorporated by reference into Decision and Order dated September 27, 2001, and affirmed by the Board in *Blackburn v. Sow Branch Coal Co.*, BRB No. 00-0208 BLA (Jul. 17, 2002)(unpub.).

Accordingly, the administrative law judge's Decision and Order on Second Remand - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge